

Recent Developments: Selling off the Plan (A warning for Developers); Retirement Villages Act Amendments; Adverse Possession. (2014) 4 Prop L Rev 146.

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## Western Australia

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### RECENT DEVELOPMENTS: SELLING OFF THE PLAN (A WARNING FOR DEVELOPERS); RETIREMENT VILLAGES ACT AMENDMENTS; ADVERSE POSSESSION

*Property lawyers in Western Australia have been busy keeping up-to-date with several new and interesting cases and some timely amendments to legislation. A recent decision of the Western Australian Court of Appeal has clarified a perplexing and long-uncertain issue involving s 13 of the Sale of Land Act 1970 (WA) and the validity of "off the plan" contracts when properties are sold prior to the developer becoming registered proprietor. In addition, the Supreme Court has considered a novel case about adverse possession where a plaintiff had acquired a mature possessory title which had not been converted to a registered title before the transfer to a Crown agency. The case is interesting as it considered the operation of both the 1935 and 2005 Limitation Acts and their respective operation in such circumstances. Finally, after much discussion and debate, Western Australia's retirement village legislation has been amended, with further amendments proposed. These legislative changes are not a "magic bullet" but do provide a greater degree of transparency and go some way towards rebalancing rights between residents and village operators.*

#### SALE OFF THE PLAN CONTRACTS – A WARNING FOR DEVELOPERS

A recent decision by the Western Australian Court of Appeal has ramifications for developers seeking to sell properties off the plan prior to becoming the registered proprietor of the land. In *Barker v Midstyle Nominees Pty Ltd* [2014] WASCA 75 it was held that a person who is not (yet) the registered proprietor of a lot must not advertise for sale or sell that lot.<sup>1</sup> In such a case, the contract will be, to that extent, illegal and unenforceable by the vendor. Such a contract will, however, be enforceable by a purchaser.

The facts were relatively straightforward. Midstyle Nominees Pty Ltd planned to build a strata title development on land in Mandurah. Midstyle was not the registered proprietor of the land at the time at which it sold certain units off the plan to the appellant purchasers; the land was registered in another entity's name. The contracts were conditional upon Midstyle becoming the registered proprietor by a certain date, a condition that was fulfilled. Sometime later, the purchasers sought to have the contracts set aside and their deposits refunded. It was claimed that the contracts were void ab initio because the contracts were entered into in breach of s 13 of the *Sale of Land Act 1970* (WA).

Section 13 of the *Sale of Land Act* prohibits the sale of certain lots unless the vendor is the registered proprietor, or is presently entitled to become the registered proprietor of the land. The section is applicable to the sale of five or more lots in a broad acre subdivision or proposed subdivision, or two or more lots in a strata subdivision or proposed strata subdivision. It was common ground that Midstyle had contravened s 13 by entering into the contracts. At issue was whether this rendered the contract unenforceable or voidable by the vendor or the purchaser. Buss JA concluded that:

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<sup>1</sup> This includes an offer to sell or an agreement to sell for valuable consideration.

In my opinion, when a would-be vendor makes a contract with a would-be purchaser for the sale and purchase of a lot, in contravention of s 13(1), the contract is illegal and unenforceable by the would-be vendor.<sup>2</sup>

In His Honour's view this was even where the vendor subsequently becomes registered proprietor after the contract is entered into.<sup>3</sup>

The decision interpreted the section broadly, concluding that s 13 was not limited to *sales* of land but included *activities prior to formation of the contract*, including advertising. Indeed, the role of s 13 role as a consumer protection provision directed at constraining certain activities of developers was emphasised by the court. Citing *Walker v Clough Property Claremont Pty Ltd* [2010] WASCA 232; (2010) 41 WAR 477, Murphy JA noted that s 13:

is in the nature of a "consumer protection" provision. ... During what may often be a lengthy period between the date of contract and settlement in the case of a proposed larger subdivision, individual purchasers may tie up not insignificant sums of money in deposits. Also, alternative opportunities for purchasers to purchase a home, or an investment property, may be deferred or displaced, in circumstances where the developer might not ultimately be able to secure for itself the title to land which is foundational to the performance of its contracts with individual purchasers in relation to the proposed subdivision. Section 13 is designed to protect potential purchasers against the risks associated with developers being unable to transfer title.<sup>4</sup>

The decision in *Barker v Midstyle Nominees Pty Ltd* is important because it clarifies some doubts about the effect of a contract entered into in contravention of s 13. It also provides a salient warning to developers as the decision will impact on some prevailing practices in relation to the sale and financing of such developments. A review of some existing pre-sale contracts may, indeed, be timely.

## AMENDMENTS AND PROPOSED AMENDMENTS TO THE RETIREMENT VILLAGES ACT

The rather complex nature of the *Retirement Villages Act 1992* (WA) has long been a source of consternation for residents and village operators. Recent (and long-awaited) amendments attempt to alleviate some of these concerns. This note does not purport to discuss the amendments in detail although the amendments are examined in some detail elsewhere.<sup>5</sup> The purpose of this note is to alert readers to the recent and also proposed amendments to the legislation.

Retirement villages in Western Australia are primarily regulated by the:

- *Retirement Villages Act 1992* (WA) (the Act);
- *Retirement Villages Regulations 1992* (WA) (the Regulations); and
- *Fair Trading (Retirement Villages Code) Regulations* (WA), which prescribes the Code of *Fair Practice for Retirement Villages* (WA) (the Code).<sup>6</sup>

Since 2009, the Code has been continued by five interim codes which retain the current provisions, the latest of which will remain in force for six months beginning on 1 October 2014 (the Second 2014 Interim Code).<sup>7</sup>

Prior to 2014, the legislation had not been altered significantly.<sup>8</sup> On 18 November 2010, a very detailed and comprehensive review in the form of the *Statutory Review of Retirement Villages Legislation 2010: Final Report* (the Review), prepared by the Department of Commerce (the Department), was tabled in Parliament, containing several recommendations for reform.

<sup>2</sup> *Barker v Midstyle Nominees Pty Ltd* [2014] WASCA 75 at [55]

<sup>3</sup> See Buss JA's discussion of s 13(1)(a)-(e) at [55].

<sup>4</sup> *Barker v Midstyle Nominees Pty Ltd* [2014] WASCA 75 at [159].

<sup>5</sup> Freilich A, Levine P, Travia B and Webb E, *Security of Tenure for the ageing population in Western Australia – Does Current Housing Legislation Support Seniors' Ongoing Housing Needs?* (COTAWA and the University of Western Australia, 2014), <http://www.cotawa.org.au/wp-content/uploads/2014/11/Housing-for-older-people-summary.pdf>, Ch 6 "Retirement Villages".

<sup>6</sup> The *Strata Titles Act 1985* (WA) also applies where residential premises in a retirement village are strata titled.

<sup>7</sup> *Fair Trading (Retirement Villages Interim Code) Regulations (No 2) 2014* (WA).

<sup>8</sup> Department of Commerce, *Statutory Review of Retirement Villages Legislation 2010: Final Report*, p v.

The Review was drawn upon by Parliament to prepare and enact the *Retirement Villages Amendment Act 2012* (the Amendment Act) in order to implement some of the key recommendations for reform set out in the Review as discussed further below.<sup>9</sup> On 1 April 2014, all of the substantive provisions of the Amendment Act which inserted provisions in the Act commenced; in addition, the proposed *Retirement Villages (Recurrent Charges, Prescribed Matters and Exemption Certificates) Amendment Regulations 2014* (the Amendment Regulations), which inserted provisions into the Regulations, commenced. Further regulations under s 14A of the Act and proposed amendments to the Code are currently being considered. It has been proposed that a revised Code (Revised Code) amend the Second 2014 Interim Code.<sup>10</sup>

The government's intention is to implement the remaining legislative reforms recommended in the Review in a second amendment act.<sup>11</sup> However, we understand that the second tranche of reforms will only commence after the first tranche is fully operational.

Several significant amendments (and proposed amendments) to the legislation include:

- prohibiting unsuitable persons<sup>12</sup> from being involved in the management of retirement villages<sup>13</sup> and enabling a statutory manager to be appointed by the State Administrative Tribunal (SAT) upon the application of the Commissioner (on behalf of the residents);<sup>14</sup>
- clarifying the matters that must be included in, and the format of village operating budgets and financial statements in relation to a village's operating budget and any reserve fund budget;<sup>15</sup>
- requiring all annual financial statements to be audited, unless the residents decide, by special resolution, that an audit is not required;<sup>16</sup>
- prohibiting funds from payments towards operating costs or reserve funds in one village from being used to develop another village and requiring the administering body to apply any surplus in the operating budget to the village in which the surplus arose (unless a special resolution of residents approves the application of all or part of these monies to any other purpose of benefit to the residents of the village);<sup>17</sup>
- requiring an administering body to provide information on a specific operating financial arrangement or about the steps taken to minimise increases in village operating costs and the costs of reserve funds upon a reasonable request by a resident for information;<sup>18</sup>

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<sup>9</sup>The Amendment Bill passed through Parliament on 23 October 2012 and gained assent on 5 November 2012. All the substantive provisions of the *Retirement Villages Amendment Act 2012* were inserted into the Act on 1 April 2014.

<sup>10</sup>The Code Consultation Discussion Paper provides that the proposed Revised Code will remain under the *Fair Trading Act 2010* (WA) until the second amendment Act when the legislation will be restructured to comprise the Act, the Regulations and a code made under the Act (as distinct from the *Fair Trading Act* as is currently the case) so that all components regulating retirement villages are contained within a single legislative package: Department of Commerce (Consumer Protection), *Consultation Discussion Paper – Review of the Terms of the Fair Trading (Retirement Villages Interim Code) Regulations 2013* (June 2013) at [2.2.1].

<sup>11</sup>Explanatory Memorandum, *Retirement Villages Amendment Bill 2012* (WA), p 3.

<sup>12</sup>Including persons who are bankrupt, who have been convicted of certain offences, who have been banned or disqualified from managing a corporation or who have been managers of a company that became insolvent.

<sup>13</sup>*Retirement Villages Act 1992* (WA), s 76.

<sup>14</sup>*Retirement Villages Act 1992* (WA), Pt 5A.

<sup>15</sup>Clauses 17, 18, 19 and 26(1)(a) and (b) of the proposed Revised Code, the *Fair Trading (Retirement Villages Code) Regulations 2014* (WA) (*Draft Regulations for Consultation*).

<sup>16</sup>Clauses 19(11) and (12) of the proposed Revised Code, the *Fair Trading (Retirement Villages Code) Regulations 2014* (WA) (*Draft Regulations for Consultation*).

<sup>17</sup>Clause 20(3) of the proposed Revised Code, the *Fair Trading (Retirement Villages Code) Regulations 2014* (WA) (*Draft Regulations for Consultation*).

<sup>18</sup>Clause 16(3) of the proposed Revised Code, the *Fair Trading (Retirement Villages Code) Regulations 2014* (WA) (*Draft Regulations for Consultation*).

- enabling the residents to agree by special resolution to apply to the SAT in relation to a dispute about an increase in charges or the imposition of a levy;<sup>19</sup>
- prohibiting an administering body from demanding or receiving payment from residents in respect of any prescribed matter;<sup>20</sup>
- clarifying the importance of an administering body engaging in effective consultation with residents,<sup>21</sup>; including making it clear that an objective of the Code is to facilitate *an effective means of consultation* between the administering body and the residents on the management of a retirement village<sup>22</sup> and providing guidelines in a grey boxed area in the Revised Code to provide practical examples of what might constitute effective consultation;<sup>23</sup>
- requiring a residence contract to set out who is responsible for arranging to carry out maintenance, repair or replacement work to ensure that the residential premises and other buildings in the village are maintained in a reasonable condition during the occupation of the premises; the contributions to be made by the resident and the administering body to these costs; and how any contribution to the costs by the resident is to be paid;<sup>24</sup>
- requiring a residence contract to include a provision allowing non-owner residents to carry out urgent repairs by selecting a contractor from an approved list displayed in a prominent place after having given the operator a reasonable opportunity to carry out the work, and to be able to seek reimbursement of costs from the administering body;<sup>25</sup>
- requiring a residence contract to provide that residents have the right to add or remove fixtures in their own dwelling, subject to approval from management; which should not be able to be unreasonably withheld;<sup>26</sup>
- “introducing a level of consistency in the standard that residential premises must be refurbished”<sup>27</sup> on a resident vacating his or her premises, by providing for a definition of refurbishment work meaning “maintenance, repair, replacement or renovation work carried out in respect of residential premises that return the residential premises to a *reasonable condition*” (emphasis added);<sup>28</sup> a requirement for a residence contract to make provision as to the person responsible for such refurbishment;<sup>29</sup> and other matters relating to refurbishment work<sup>30</sup> including

<sup>19</sup> *Retirement Villages Act 1992* (WA), s 57A.

<sup>20</sup> *Retirement Villages Act 1992* (WA), s 25(1) and reg 11 of the Regulations.

<sup>21</sup> Clauses 4(e) and 16 of the proposed Revised Code, the *Fair Trading (Retirement Villages Code) Regulations 2014* (WA) (*Draft Regulations for Consultation*).

<sup>22</sup> Clause 4(e) of the proposed Revised Code, the *Fair Trading (Retirement Villages Code) Regulations 2014* (WA) (*Draft Regulations for Consultation*).

<sup>23</sup> Grey boxed area under Clause 4 of the proposed Revised Code, the *Fair Trading (Retirement Villages Code) Regulations 2014* (WA) (*Draft Regulations for Consultation*).

<sup>24</sup> See proposed *Retirement Village Amendment Regulations 2014 (Draft Regulation for Consultation)*, reg 7G, Table, Items 1 and 3 under *Retirement Villages Act 1992* (WA), s 14A. It is understood that it is proposed to incorporate the Review’s recommendations in relation to reserve funds into the Second Amendment Act: Interviews conducted with the Department for the purposes of the study conducted by the Consumer Research Unit at University of Western Australia in collaboration with the Council on the Ageing Western Australia: See Freilich, et al, n 5.

<sup>25</sup> See proposed *Retirement Village Amendment Regulations 2014 (Draft Regulation for Consultation)*, reg 7G(1) and (3) under *Retirement Villages Act 1992* (WA), s 14A.

<sup>26</sup> See proposed *Retirement Village Amendment Regulations 2014 (Draft Regulations for Consultation)*, reg 7G, Table, Items 4 – 5 under *Retirement Villages Act 1992* (WA), s 14A.

<sup>27</sup> Government of Western Australia, Department of Commerce, *Retirement Villages: Revised code supplementary information* p 1 at <http://www.commerce.wa.gov.au/publications/retirement-villages-revised-coe-supplementary-information>.

<sup>28</sup> Clause 22(1) of the proposed Revised Code, the *Fair Trading (Retirement Villages Code) Regulations 2014* (WA) (*Draft Regulations for Consultation*).

<sup>29</sup> See proposed *Retirement Village Amendment Regulations 2014 (Draft Regulation for Consultation)*, reg 7G(2) and Table, Item 2 under *Retirement Villages Act 1992* (WA), s 14A.

<sup>30</sup> For example, clarifying the information that an administering body must give a resident who is permanently vacating his or her premises, regarding items of refurbishment work to be done: the proposed revised Code (*Fair Trading (Retirement Villages Code) Regulations 2014*, cl 22(2)(a) and (b)); inserting a requirement for the former resident or their personal representative to

building upon the SAT's existing jurisdiction to deal with refurbishment disputes to ensure that arrangements relating to the costs of refurbishment are fair, including, inter alia, that any refurbishment work is reasonably required and the cost of the work is not excessive or unreasonable;<sup>31</sup> and

- limiting the liability of a former non-owner resident to pay recurrent charges once a non-owner resident has permanently vacated a village for three months for future contracts and six months for existing contracts.<sup>32</sup>

It is hoped that these amendments will address several long-standing areas of concern, especially for older residents. Unfortunately, some remain obscure and somewhat contentious thus rendering it likely that the legislation will be the subject of continued debate for some time to come.

### **A NOVEL CASE INVOLVING ADVERSE POSSESSION**

Western Australian real property lawyers must be cognisant of the provisions of two pieces of legislation when dealing with adverse possession. The *Limitation Act 2005* (WA) is not applicable to circumstances giving rise to adverse possession commencing prior to its enactment. Such claims will, until 2017 at least, require consideration of the *Limitation Act 1935* (WA). *Goodwin v Western Australian Sports Centre Trust* [2014] WASC 138 examined several interesting points regarding the interaction between the legislation and also the effect of claims involving the Crown.

In *Goodwin*, the plaintiff had acquired a mature possessory title which had not been converted to a registered title before the transfer to a Crown agency was registered. At the heart of the case was whether the plaintiff's claim for alleged trespass was barred pursuant to s 76 of the *Limitation Act 2005* (WA) (formerly s 36 of the *Limitation Act 1935*). Section 76 states that no title by adverse possession can be claimed against the Crown. At first glance it would seem the matter could be decided in a very straightforward manner.

Indeed, the case had similar facts to *Water Corporation v Hughes* [2009] WASC 152. In that case, however, the alleged adverse possession of the land by Hughes had not continued for the whole of the limitation period before the Water Corporation, a statutory agency, became the registered proprietor and went into possession. Under the 1935 Act the continued adverse possession of the subject land by Hughes was, from that point on, ineffective.

*Goodwin* differed because, assuming the possessory interest could be established, the possession had continued *beyond* the statutory period of 12 years. The Crown, through the Western Australian Sports Centre Trust, was the transferee from the then registered proprietor. The title of the registered proprietor was, however, subject to the plaintiff's claim of adverse possession. It was alleged that the plaintiff's possession could be combined with that of his predecessors in title thus satisfying the 12-year statutory period.<sup>33</sup> At issue was whether the exclusion of actions for adverse possession against the Crown extended to such circumstances. As EM Heenan J noted at [79]:

the distinguishing feature of this case is that, on the facts pleaded, the plaintiff had a fully accrued and, hence, vested possessory estate in the land before his possession was terminated by the actions of one or more of the defendants. That title would in law, although not registered, prevail over the title of the registered proprietor or any transferee from the registered proprietor by virtue of s 68(1A) of the *Transfer of Land Act*.

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be given a reasonable opportunity to inspect refurbishment works that they will be contributing to (cl 22(2)(b)(iii) and (b) of the proposed Revised Code, the *Fair Trading (Retirement Villages Code) Regulations 2014* (WA) (*Draft Regulations for Consultation*)); clarifying matters to which an administering body must have regard when assessing what refurbishment work may be required (cl 22(3) of the proposed Revised Code, the *Fair Trading (Retirement Villages Code) Regulations 2014* (WA) (*Draft Regulations for Consultation*)).

<sup>31</sup> Clause 22(4) of the proposed Revised Code, the *Fair Trading (Retirement Villages Code) Regulations 2014* (WA) (*Draft Regulations for Consultation*).

<sup>32</sup> *Retirement Villages Act 1992* (WA), s 23 and *Retirement Village Regulations 1992* (WA), reg 9.

<sup>33</sup> EM Heenan J assumed this was the case.

EM Heenan J provided an interesting comparison of the scope and operation of the 1935 and the 2005 *Limitation Acts*, particularly in relation to the whether the later legislation can bind the Crown.<sup>34</sup> Noting that *Water Corporation v Hughes* did not deal with the position where “a fully matured legal estate in fee has been acquired by adverse possession continuing for more than the limitation period before any interest in the land has been acquired by the Crown or an agent of the State”, His Honour concluded such a possessory title was not acquired by possession adverse to the Crown and it is therefore was not covered by s 36 of the *Limitation Act 1935*. As to whether the situation was covered by the additional wording in s 76 of the 2005 Act, EM Heenan J held that it was not.

So, what was the outcome for the plaintiff? Clearly little could be done in that, by the time the case came to trial, the Champion Lakes facility was operational. This did not prevent, however, the plaintiff from bringing an action in trespass against the Crown for the time they occupied the land prior to the time it became Crown property. Furthermore, His Honour continued:

Even if this conclusion were wrong, and s 76 terminated any possessory title of the plaintiff from the time when the Crown or a State agent first obtained an interest in Lot 500, that would not protect others from the plaintiff’s claim in trespass. Nor would it protect the State agent for trespasses committed by its servants or agents before the State agent obtained a proprietary interest in the land. So, for example, a trespass on the land by the City of Armadale, by itself or by its agent the second defendant (who has not been heard on this application) or by the ARA or the MRA before either became registered proprietor of the land or the former obtained a leasehold interest would not be protected, an action would lie in trespass against such persons for interference with the plaintiff’s possessory title at times before a proprietary interest was acquired by the State agent.<sup>35</sup>

Although matters involving the 1935 act will become fewer and fewer, this case is an interesting discussion as to how the new legislation may differ from the former *Limitation Act*. It also provides insights into the (sometimes surprisingly) complex issues regarding claims of adverse possession that involve the Crown.

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<sup>34</sup> The Crown can, indeed, be bound in some circumstances (s 10), however this is subject to s 76.

<sup>35</sup> *Goodwin v Western Australian Sports Centre Trust* [2014] WASC 138 at [82].